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What Is Consideration in the Anglo-American Law of Contracts, Part II

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WHAT IS CONSIDERATION IN THE ANGLO-AMERICAN LAW OF CONTRACTS?*

A Historical Summary.

II.

DETRIMENT TO PROMISEE.

Has detriment to the promisee in any form been adopted, since the sixteenth century, as sufficient consideration for a promise? Yes. Other things may be sufficient consideration. Consideration may not always have to be legal detriment. But, if it is given as the price for a promise, legal detriment is always consideration. This theory of consideration had its origin in the action of special assumpsit. When this action was regarded as a tort action, the courts allowed recovery where the defendant undertook to do something for the plaintiff and was guilty of malfeasance, or misfeasance,⁵⁹ or nonfeasance,⁶⁰ to the plaintiff's detriment, or injury. After recovery was allowed in the case of nonfeasance, the action came to be regarded as a contract action. Then the courts found consideration in the detriment of the old cases, but, for reasons to be referred to later, they began to require that this detriment be incurred as the price, or inducement, etc., for the promise, instead of its merely following the breach of the promise. There is no doubt, therefore, that ever since the courts took this position detriment to the promisee has been regarded as sufficient consideration for a prom-

*The first installment of this article was published in the issue of March, 1924, of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, at page 245 (72 U. OF PA. L. REV. 245).

⁵⁹ *Watson v. Brinth*, Year Book, 2 Hen. IV. 3 b; Y. B. 11 Hen. IV. 33 a; Y. B. 3 Hen. VI. 36 b.

⁶⁰ *Anonymous Case*, Y. B. 21 Hen. VII. 41, also reported in *Keilway*, 78 pl. 5; *Estrigge v. Owles*, 3 Leon. 200; *Banes' Case*, 9 Coke 94. In Y. B. 21 Edw. IV. 23, pl. 6 and Y. B. 20 Hen. VII. 8, pl. 18, the reason given for such extension of the action of special assumpsit was to obviate the necessity of suitors going into chancery. See also, *Hare, Contracts*, Ch. VII.; *Ames, Lectures on Legal History*, 129, 323; *Holmes, The Common Law*, 289, 290.

ise, if given in exchange for it, and there are thousands of cases in the books which have so held. The only doubt is as to the meaning of the expression "detriment to the promisee." What is meant by this term? Does it mean any act or promise to which a person has a legal capacity, that is, any legal right, power, privilege, or immunity? Or does it mean simply any act or promise, irrespective of the question as to whether or not a person has a legal capacity with reference thereto? There seems to be authority for each of these views, at least, and we shall consider them separately.⁶¹ The term clearly does not mean actual detriment.

ANY ACT OR PROMISE WITH REFERENCE TO WHICH A PERSON HAS LEGAL CAPACITY.

Will the surrender for a promise (in a unilateral agreement), or the promise to surrender for a promise (in a bilateral agreement), of anything with reference to which a person has a legal right, a legal power, a legal privilege, or a legal immunity amount to sufficient consideration? Yes. There is no doubt that this will be sufficient consideration. There seem to be no cases holding otherwise. Instead, most of the cases hold that unless a person surrenders, or promises to surrender, one of the above things, there is no consideration.⁶² This is the doctrine

⁶¹ Some authorities assert that detriment to the promisee can be found only in the obligation in law created by a promise. Pollock, *Contracts*, (3d Am. ed.) 202; Langdell, *Contracts*, Sec. 81.

⁶² *Warren v. Hodge*, 121 Mass. 106; *Foakes v. Beer*, 9 App. Cas. 605; *Austin, etc. Co. v. Bahn*, 87 Tex. 582; *Poole v. Boston*, 5 Cush. 219; *Keith v. Miles*, 39 Miss. 442; *Fink v. Smith*, 170 Pa. 124; *Neikirk v. Williams*, 81 W. Va. 558; *Strong v. Sheffield*, 144 N. Y. 392; *Stilk v. Myrick*, 2 Camp. 317; *Davis & Co. v. Morgan*, 117 Ga. 504; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *McDevitt v. Stokes*, 174 Ky. 515; *Bridge v. Cage*, Cro. Jac. 103; *Gray v. Martino*, 91 N. J. L. 462; *Ryan v. Dockery*, 134 Wis. 431; *Tolhurst et al. v. Powers*, 133 N. Y. 460; *Herring v. Dorell*, 8 Dowling 604 (Eng.); *Springstead v. Nees et al.*, 125 App. Div. (N. Y.) 230; *White v. Bluett*, 23 L. J. (N. S.) Exch. 36.

It would seem as though the court might have found legal detriment in the case of *Springstead v. Nees*, *supra*, in the fact that the other children had the legal privilege of complaining. In the case of *White v. Bluett*, *supra*, perhaps the father had the legal right to have his son refrain from complaining. Otherwise this case is like *Springstead v. Nees*, and both would confine legal detriment to cases of strict legal rights.

of legal detriment. According to this doctrine it is not necessary for the promisee to sustain or to promise to sustain actual detriment. If he gives up, or promises to give up, any legal right, legal power, legal privilege, or legal immunity, it is sufficient.

Any legal right, or the promise thereof, given for a promise, has universally been held sufficient consideration. Thus the surrender of possession of chattels in bailment cases,⁶³ the giving up of a paper containing a guaranty even though the guaranty was unenforceable,⁶⁴ a promise to pay a part of the ground rent to a third person and a promise to make repairs,⁶⁵ the delivery of a check,⁶⁶ a promise to share profits,⁶⁷ a promise to pay chattels,⁶⁸ the turning over to another of certain bills receivable,⁶⁹ a promise to pay interest,⁷⁰ have all been held to be sufficient consideration, because in each case there has been the giving up, or the promise to give up, something to which a person has a legal right. Many other illustrations of consideration of this sort could be given. The giving up, or the promise to give up, a legal right to a tract of land, or any interest therein, a legal right to a contract or any other incorporeal thing, a legal right to any corporeal chattel, a legal right to safety, a legal right to reputation, a legal right to liberty, or any other legal right, so long as the law will permit it, would amount to legal detriment and therefore sufficient consideration.⁷¹

⁶³ *Bainbridge v. Firmstone*, 8 Adol. & El. 743. It should be noted that in gratuitous bailments there is no consideration because, though there is legal detriment, it is not the price of the promise. 5 HARV. L. REV. 222.

⁶⁴ *Haigh v. Brooks*, 10 Adol. & El. 309.

⁶⁵ *Thomas v. Thomas*, 2 Q. B. 851. Probably this case was wrongly decided because the legal detriment was not the price of the promise.

⁶⁶ *Bidder v. Bridges*, 37 Ch. D. 406. Cf. United States cases.

⁶⁷ *Coleman v. Eyre*, 45 N. Y. 38.

⁶⁸ *Lima, etc. Co. v. National, etc. Co.*, 155 Fed. 77; *Koehler, etc. Co. v. Illinois Glass Co.*, 143 Minn. 344.

⁶⁹ *Murphy v. Hanna, et al.*, 37 N. D. 156.

⁷⁰ *McComb v. Kittridge*, 14 Ohio 348.

⁷¹ 13 C. J. 318-320.

In the same way any legal privilege, or the promise thereof, given for a promise, has been held to be sufficient consideration. An inferred promise to buy coal of one person rather than another,⁷² making an affidavit,⁷³ taking a trip to Europe,⁷⁴ a promise to defend suits,⁷⁵ an act by an officer outside his legal duty,⁷⁶ refraining from drinking liquor or from using tobacco,⁷⁷ refraining from other bad habits,⁷⁸ getting an acceptable tenant,⁷⁹ refraining from trying to get a husband to change the beneficiary in an insurance policy,⁸⁰ an inferred promise to use reasonable efforts to bring profits,⁸¹ a promise to give another a right to buy back stock,⁸² giving an executor the privilege of suing in his own name,⁸³ giving up the privilege of going through bankruptcy,⁸⁴ marriage,⁸⁵ forbearance from suing, or a promise to forbear from suing, on a doubtful claim honestly asserted on reasonable grounds,⁸⁶ and many other things too numerous to mention have

⁷² *Wells v. Alexander*, 130 N. Y. 642.

⁷³ *Brooks v. Ball*, 18 John. 337.

⁷⁴ *Devecmon v. Shaw*, 69 Md. 199.

⁷⁵ *Martin v. Meles*, 179 Mass. 114.

⁷⁶ *England v. Davidson*, 11 Adol. & El. 856; *Hartley v. Inhabitants, etc.*, 216 Mass. 38.

⁷⁷ *Hamer v. Sidway*, 124 N. Y. 538.

⁷⁸ *Dunton v. Dunton*, 18 Vic. L. Rep. 114.

⁷⁹ *Underwood, etc. Co. v. Century R. Co.*, 220 Mo. 522.

⁸⁰ *Orr v. Orr*, 181 Ill. App. 148.

⁸¹ *Wood v. Lucy, etc.*, 222 N. Y. 88.

⁸² *Vickery et al. v. Maier et al.*, 164 Cal. 384.

⁸³ *Goring v. Goring*, Yelv. 11.

⁸⁴ *Melroy et al. v. Kemmerer*, 218 Pa. 381.

⁸⁵ 13 C. J. 322.

⁸⁶ *Rivett and Rivett's Case*, 1 Leon. 118; *Smith v. Monteith*, 13 M. & W. 427; *Cooke v. Wright*, 1 Best & Smith 559; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Miles v. New Zealand*, 32 Ch. Div. 266; *Hay v. Fortier*, 116 Me. 455; *Morton v. Burn & Vaux*, 7 Adol. & El. 19. At first the English cases held that forbearance to sue, or a promise to forbear from suing, would amount to consideration only when one had a legal right to sue. *Bidwell v. Catton*, Hobart 216; *Mapes v. Sidney*, Cro. Jac. 683; *Davies v. Warner*, Cro. Jac. 593; *Dowdenay v. Oland*, Cro. Eliz. 768; *Lloyd v. Lloyd*, 1 Strange 94; *Atkinson v. Settree*, Willes 482; *Jones v. Ashburnham*, 4 East 455. (But compare *Rivett and Rivett's Case*, 1 Leon. 118.) Then it was held that if suit had actually been instituted, forbearance to prosecute it would be sufficient consideration, whether or not such suit would have been successful. *Longridge v. Dorville*, 5 B. & Ald. 117. But finally the English courts took the position that forbearance or a promise to forbear suit upon a doubtful claim, if reasonable and honestly asserted, is suf-

been held sufficient consideration if given for a promise, though they were only legal privileges.

The giving, or the promise to give, for a promise, any legal power, or any legal immunity will also amount to consideration. A good illustration of how the surrender of a power, or the promise to do so, may amount to legal detriment is found in the case of *White v. McMath & Johnson*.⁸⁷ In that case McMath & Johnson had received from the owners an offer of sale of a tract of land, which gave them the power of making a contract by acceptance. White also desired to purchase this property but the owners would not make him an offer so long as their offer to McMath and Johnson stood. White then offered to pay them \$240 for their promise to relinquish their power of acceptance

sufficient consideration whether or not suit has previously been begun.

The present English position seems to the writer to be correct, because under such circumstances a plaintiff has the privilege to sue. If a legal wrong has been committed, a person has a legal right to sue, because of his remedial right *in personam*. Even though no legal wrong has been committed, a person has a privilege to sue so long as the claim is reasonable and honestly asserted, because the other party has no right to have him refrain from suing. Everyone has a right not to be sued maliciously and without probable cause, and there is the correlative duty not to institute such action. A violation of this duty is the tort of malicious prosecution. Where there would be no tort in suing, a person has the privilege of suing. The English law of contracts is, therefore, right, but its law of torts should be extended to cover civil actions where the privilege of suit is denied. Generally it will not be known ahead of time whether a person has the right or only the privilege of suing. If he wins his suit, that determines that he had a legal right to sue. If he loses his suit, still he had the legal privilege of suing except where he would have been guilty of malicious prosecution by suing.

In the United States there is a conflict in the decisions upon this subject. So far as consideration is concerned some cases follow the recent English doctrine, while others follow the early English rule. So far as malicious prosecution is concerned, a majority of the United States cases have extended the law to meet the modern English rule as to consideration. *Prout v. Inhabitants, etc.*, 154 Mass. 450; *Blount v. Wheeler et al.*, 199 Mass. 330; 26 Cyc. 12-16; 13 C. J. 346-7.

⁸⁷ 127 Tenn. 713.

Mr. Corbin speaks of the power to break a contract (27 YALE L. JOUR. 371). It seems to the writer that Mr. Corbin has used the word "power" in the wrong sense. There may be the physical power to break a contract, but the writer does not see how there can be any legal power to do so, because breach of contract is a legal wrong.

and they accepted his offer and made such promise. The court held this sufficient consideration for White's promise. An illustration of an immunity whose surrender would amount to legal detriment is found in the constitutional immunity given against the impairment of the obligation of a contract.

ANY ACT OR PROMISE.

Other authorities, however, hold that detriment to the promisee does not have to consist of legal detriment, but that any act or promise given for a promise is sufficient detriment to answer the requirements of consideration. A promise by an infant to marry an adult is held to be sufficient consideration for the adult's promise,⁸⁸ though the contract is voidable by the infant. The infant has promised to perform if he chooses. The giving up, or the promise to give up, the privilege of, single blessedness would be legal detriment, and therefore the adult's promise would be consideration for the infant's in the sense of legal detriment, but it is impossible to see how there can be legal detriment in the sense that a person has promised to surrender a legal privilege when he has promised to do so if he chooses, or unless he chooses not to do so. Hence the only detriment to the promisee in such cases is the making of the promise. The same thing is true of all voidable promises,⁸⁹ and probably of conditional promises.⁹⁰ Yet in such cases we have true contracts, and that means consideration. One party simply has a defense of which he may avail himself if the other tries to hold him to the contract. Therefore the theory of consideration adopted in such cases must be that any act or promise is sufficient detriment to the promisee to constitute consideration. In compromise cases, also, unless the privilege of suit is surrendered, it is impossible to see how one person has in unilateral cases sur-

⁸⁸ *Holt v. Ward* Clarendieux, 2 Strange 937.

⁸⁹ *Atwell v. Jenkins*, 163 Mass. 362; Williston, *Contracts*, sec. 105.

⁹⁰ *McMullan v. Dickinson Co.*, 66 Minn. 405; *Coleman v. Eyre*, 45 N. Y. 38.

rendered anything more than an act, and in bilateral cases promised anything but a promise.⁹¹ But the best illustrations of the repudiation of the theory that detriment to the promisee, or the promise thereof, must be any act or promise with reference to which a person has legal capacity, and of the adoption of the theory that it may consist merely of any act or promise, are found in the cases of the performance, or the promise to perform, a pre-existing legal duty. If the act or the promise is given to the person to whom the promisor is already under existing duty, there is neither legal detriment to the promisee nor legal benefit to the promisor. If the act or promise is given to a third person, it is hard to see how there is legal detriment, though it may be argued that there is legal benefit. For this reason the English cases of type one and most of the United States cases of both types hold that there is no consideration.⁹² However, the English cases of type two and some United States cases of both types hold that there is consideration in such cases,⁹³ and the theory of these cases must be discovered. The courts in both types of cases apparently proceed on the theory of detriment to the promisee rather than benefit to the promisor. Hence

⁹¹ *Cook v. Songat*, 1 Leon. 103; 4 Leon. 31; *Seward & Scales v. Mitchell*, 1 Cold. 87; *Nassoiv v. Tomlinson*, 148 N. Y. 326.

⁹² *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *McDevitt v. Stokes*, 174 Ky. 515; *Davis v. Morgan*, 117 Ga. 504. Williston, *Contracts*, sec. 130, and the rule has been extended to cases of discharge of contracts. *Foakes v. Beer*, *supra*.

⁹³ *Sherwood v. Woodward*, Cro. Eliz. 700; *Shadwell v. Shadwell*, 30 L. J. C. P. 145; *Scotson v. Pegg*, 6 Hurl. & N. 295; *Lattimore v. Harsen*, 14 John. 330; *Monroe v. Perkins*, 9 Pick. 298; *Abbott v. Doane*, 163 Mass. 433; *DeCicco v. Schweizer et al.*, 221 N. Y. 431; *Schwartzreich v. Bauman-Basch, Inc.*, 103 Misc. Rep. 214.

The writer cannot agree with Mr. Williston that these cases were decided on the ground of benefit to the promisor. In them there was some talk of benefit, but the judges tried harder to find detriment than to find benefit; and the writer at least cannot understand why anyone should desire to introduce into the law of consideration another difficult theory when it already has too many, especially in view of the fact that it will explain only cases of type two and not those of type one, and in view of the fact that the law of quasi contracts is supposed to cover recovery for benefits con-

it would seem that they adopt as their theory of consideration detriment to the promisee, or the promise thereof, in the sense of any act or promise. This is certainly true of the cases of type one,⁹⁴ where the second attempted contract is between the same parties, and it is true of the cases of type two where a third party is brought in unless the theory of benefit to the promisor is accepted to explain them.

The late Dean Ames championed the theory that detriment to the promisee did not have to be an act or promise with reference to which a person had legal capacity but that any act or promise was enough, and he maintained that such theory came nearest to reconciling the cases.⁹⁵ He defined consideration "as

ferred whenever in equity and good conscience the one benefited ought to pay therefor. *Edson v. Pappe*, 24 S. D. 466; *Sharp v. Hoopes*, 74 N. J. L. 191.

The explanation of some of the courts that the old contract is mutually rescinded and that then the parties enter into a new contract is not satisfactory, because in practically all cases it is contrary to the facts and a mere fiction. The courts have really adopted a new theory of consideration, and they would do better to say so than to pretend that the facts are what they are not in order to escape this contingency. *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578. The explanation of other courts that there is consideration, if a person encounters new and unforeseen difficulties and goes on or promises to go on and complete the work for a new promise of greater compensation, *Michand v. MacGregor*, 61 Minn. 198; *Linz v. Schuck*, 106 Md. 220; *King v. Duluth, etc., R. Co.*, 61 Minn. 482; is also hard to understand; unless thereby they mean either (1) this new and unforeseen difficulty was not embraced within the original pre-existing duty, or (2) that it was an implied condition subsequent terminating the original contract, or (3) that it was ground for rescission in equity because of a mutual assumption as to a matter of performance. Equally fallacious is the explanation that a person has a right to sue for damages and that waiving this is sufficient consideration, *Evans v. Oregon, etc., Ry.*, 58 Wash. 429, for the other party must furnish consideration, and he has no right to pay damages.

⁹⁴ *Lattimore v. Harsen* and *Monroe v. Perkins*, *supra*, note 93.

⁹⁵ "The examination of our three classes of cases, of which *Callisher v. Bischoffsheim*, *Shadwell v. Shadwell*, and *Foakes v. Beer*, are the conspicuous illustrations, makes it clear that the authorities cannot be reconciled with any theory of consideration. We must either adopt the view that consideration is any act or forbearance not already due from the promisee, and treat the first two classes of cases as exceptions, indefensible on principle, but established as law in England, and either already representing, or likely to represent, the predominant judicial opinion in this country, or else we

any act or forbearance" (unilateral), or promise (bilateral) "by one person given in exchange for a promise by another."⁹⁶

If consideration was defined as Mr. Ames defined it, there would be found in the law of consideration nothing which is not already found in the law of agreement. In every unilateral agreement there would be an act, and in every bilateral agreement there would be a promise, given in exchange for a promise. Hence it would add nothing to require consideration, and it would not be necessary to give it separate study or discussion. The law of agreement, with its requirement of offer and acceptance, would cover everything.

What, then, is the meaning of "detriment to the promisee"? It is impossible to answer this question. If it means any act or promise with reference to which a person has legal capacity, that is any legal right, privilege, power, or immunity, the instances where any act or promise has been held sufficient consideration will have to be classed as exceptions. If it means any act or promise, then it is a work of supererogation to talk about legal detriment, for "any act or promise" is the broader term and would include all cases of legal detriment. Of course any act or promise, which is also a legal right, or legal privilege, or legal power, or legal immunity, is always sufficient consideration; but it cannot be said that the act or promise must be one of these, for in many cases it may be merely any act or promise. If we were sure that consideration in Anglo-American law had to be

must adopt the other view, that consideration is any act or forbearance by the promisee, and regard the third class of cases, of which *Foakes v. Beer* is the type, as an exception contrary to principle, but sanctioned by the highest judicial authority in England and the United States." Ames, *Lectures on Legal History*, 339.

The writer does not agree with Mr. Ames' interpretation of the case of *Callisher v. Bischoffsheim*, because he thinks in that case there was the surrender of a legal privilege, but he does agree with Mr. Ames' general point of view.

⁹⁶ Ames, *Lectures on Legal History*, 323.

Many early cases make the statement that a promise for a promise is sufficient consideration. *Strangeborough and Warner's Case*, 4 Leon. 3; *Nichols v. Raynbred*, Hob. 88; *Goring v. Goring*, Yelv. 11; *II Street, Found. Legal Lia.*, 107-111, 135.

detriment to the promisee in one or the other of these senses, our problem would be simplified, but we have already learned that the notion of benefit to the promisor is one which cannot be entirely ignored, and we are going to learn that there are other notions of consideration which cannot be forgotten.⁹⁷

Can it be said that detriment to the promisee, in either of the above senses, is required by Anglo-American law? Nobody knows.

GIVEN FOR A PROMISE.

Whatever doubt there may be as to benefit to the promisor and detriment to the promisee as consideration, there is no doubt that so far as these forms of consideration are concerned, if they are to be sufficient consideration, they must be given in exchange for a promise. This evidently means that the common law theory of consideration is something more than the will theory of the Roman law and the evidence theory of Lord Mansfield, and yet it is not the equivalent theory, or the injurious reliance theory: it is more like the bargain theory.⁹⁸ It means that something must be given as the price for a promise. Gratuitous promises will not be enforced. The consideration does not have to be adequate.⁹⁹ It does not have to be the inducing cause of the promise.¹⁰⁰ It is enough if it is given in exchange for, or as

⁹⁷ It must be borne in mind, also, that the text-writers are not agreed that there is no distinction between unilateral agreements and bilateral agreements. Williston, *Contracts*, secs. 103-103d, sec. 131a; Street, *Found. Legal Lia.*, 107-121; Corbin in 27 *YALE L. JOUR.* 374-381; Leake, *Contracts* (1st ed.) 314; (2d ed.) 612, 613.

⁹⁸ Pound, *Introduction to Philosophy of Law*, 269-276; Pillans *et al.* v. *Van Mierop et al.*, 3 Burr. 1663.

⁹⁹ *Schnell v. Nell*, 17 Ind. 29.

¹⁰⁰ Justice Holmes' statement to the contrary in *Wisconsin, etc., Co. v. Powers*, 191 U. S. 379, is not supported by the weight of authority. *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522. Note also cases of unilateral contracts, where the promise may induce the act, but the act does not induce the promise.

the price for, a promise.¹⁰¹ Here again we have the same idea that we have in the law of agreement.¹⁰²

From what source came the requirement of consideration now under discussion? It cannot be found in the tort action of special assumpsit before it became a contract action, for at that time the detriment to the promisee was not given in exchange for the promise but followed as a consequence of failure to perform the promise. Mr. Salmond contends that the requirement that whatever is consideration must be given for a promise was imported from equity.¹⁰³ Mr. Justice Holmes contends that it was imported from debt, with its requirement of *quid pro quo*.¹⁰⁴ Both equity and debt had similar requirements in this respect. This notion, taken from one or both sources, was amalgamated with the idea of detriment to the promisee to give the dual modern requirement that the act or promise must be given in exchange for another promise.

For this reason love and affection of the promisor,¹⁰⁵ an offer of a gift with burdens,¹⁰⁶ performance of an act without a knowledge of or an intent to accept an offer of reward for that act, and a promise for a past consideration,¹⁰⁷ are all cases

¹⁰¹ *Brawn et al. v. Lyford*, 103 Me. 362. Hence liability in gratuitous bailments should not be explained on contract ground but on the ground of an obligation imposed by law without contract. *Carr et al. v. Maine Cent. R. R.*, 78 N. H. 502; *Fooly and Preston's Case*, 1 Leon. 297; *Wheatley v. Low*, Cro. Jac. 668; *Coggs v. Bernard*, 2 Ld. Ray. 920, *contra*.

¹⁰² *Kirksey v. Kirksey*, 8 Ala. 131; *J. H. Queal & Co. v. Peterson*, 138 Iowa 514; *Schroyer v. Thompson*, 262 Pa. 282. Cf. *Thomas v. Thomas*, 2 Q. B. 851, and *Brackenbury et al. v. Hodgkin et al.*, 116 Me. 399; *Williams v. Carwardine*, 4 Barn. & Adol. 621; *Dawkins v. Sappington*, 26 Ind. 199, *contra*.

¹⁰³ Salmond, *History of Contracts*, 3 Select Anglo-American Essays, 325-329, 335-337.

¹⁰⁴ Holmes, *Common Law*, 286.

¹⁰⁵ *Schnell v. Nell*, 17 Ind. 29.

¹⁰⁶ *Kirksey v. Kirksey*, 8 Ala. 131. See notes 102 and 134.

¹⁰⁷ *Roscorla v. Thomas*, 3 Q. B. 234; *Moore v. Elmer*, 180 Mass. 15; *Mills v. Wyman*, 3 Pick. 207.

It should be noted that the requirement under discussion applies only in that part of the law which has grown up out of the action of special assumpsit. It has no application in that part of the law which has grown up out of the action of general assumpsit, except as it has anomalously been extended to inferred contracts. Precedent debt was the early requirement

where it has been held that there was no consideration, because in such cases the promisee gives nothing in exchange for, or to buy, the promise. Charitable subscription cases and moral consideration cases are also cases where nothing is given in exchange for the promise, and if the courts were consistent, they would hold that there is no consideration, but since they have not been consistent these cases will have to be explained on some other ground. But if it is found that some act or promise was given in exchange for a promise, the courts will find consideration.¹⁰⁸ Can it be said, then, that it is Anglo-American law that something must always be given for a promise? No one knows.

MORAL CONSIDERATION.

We have already seen how Lord Mansfield introduced moral consideration into Anglo-American law in lieu of the consideration of precedent debt in general assumpsit cases.^{108a} It is true that the judges following Lord Mansfield refused to extend the doctrine of moral consideration to any new cases,¹⁰⁹ and later judges explained the earlier cases on the ground of waiver; but since the waiver theory is proving untenable, the judges are having to go back to the ground upon which Lord Mansfield based his decisions. Lord Mansfield would like to have introduced new doctrines of consideration into all of the law of contracts,¹¹⁰ but his immediate successors were not possessed with his ambition, so that at last the doctrine of moral consideration became practically obsolete, except as it survived in a few states of the Union and except as it still obtained in precedent debt cases.¹¹¹ But within the last few years there seems to have been a recrudescence of the theory of moral consideration.

in general assumpsit cases, and a quasi contract is the modern requirement. *Janson v. Colomore*, 1 Rolle 396; *Slade's Case*, 4 Coke 92b; *Sidenham and Worlington's Case*, 2 Leon. 224; *Rann v. Hughes*, 7 J. R. 350.

¹⁰⁸ *Thomas v. Thomas*, 2 Q. B. 851; *Alliance Bank v. Broom*, 2 Drew. & S. 289.

^{108a} See "General Assumpsit," *supra*.

¹⁰⁹ *Biddington v. Wallace*, 4 Barn. & Ald. 650; *Littlefield v. Shee*, 2 Barn. & Ald. 811; *Eastwood v. Kenyon*, 11 Adol. & El. 438.

¹¹⁰ *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1663.

¹¹¹ *Williston, Contracts*, secs. 149-204. See notes 28 and 30, *supra*.

In the case of *Bagaeff v. Prokapck*,¹¹² a note was given for a commission which the defendant had orally promised to pay the plaintiff for the sale of land, and the court held the note enforceable because it was supported by moral consideration. The oral promise was void under the statute of frauds, and therefore was never a legal obligation, but the court held that moral obligation was sufficient to support the promise in spite of that fact.

In the case of *Muir v. Kane, et ux*,¹¹³ the facts were almost identical with those in the above case except that the defendant did not make his promise directly to the plaintiff, and the court permitted recovery on the ground of moral obligation. On the "distinction between contracts formerly good, but on which the right of recovery has been barred by the statute, and those contracts which are barred in the first instance because of some legal defect in their execution . . . it has seemed to us the distinction is not sound. The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract where the statute requires such contract to be in writing is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations. . . . The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt; if there were, there would be no need for a new promise. The obligation is moral solely, and, since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not."

Hence it can no longer be said that moral consideration is not sufficient for a promise, either where there was a prior legal obligation, or where there was none. If moral consideration is sufficient for some promises of each class, why not for all

¹¹² 212 Mich. 265.

¹¹³ 55 Wash. 131. See also, *Straus v. Cunningham*, 159 App. Div. (N. Y.) 718; *Bentley v. Morse*, 14 John. 468, and cases cited in notes 28 and 30.

promises? Moral consideration has none of the characteristics of the common law consideration of detriment to the promisee, or even of benefit to the promisor, given for a promise, and if it should receive general adoption the others would have to be rejected. Whether, if moral consideration was adopted, it would remain permanently is doubtful. In *Eastwood v. Kenyon*,¹¹⁴ it was said that it "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." Perhaps this is so. At any rate, whatever is or is going to be the status of moral consideration, we already have a number of decisions which have enforced promises simply as such without any requirement of consideration. If moral consideration were not to have this result and be thus defined, how should it be defined? It is doubtful if an answer could be given to this question. What then is the status of moral consideration in Anglo-American law? Nobody knows.

EVERY PROMISE INTENDED TO BE BINDING.

There are many cases where promises have been enforced simply as promises without any consideration whatever and without any agreement. Most of these have been promises in writing, but some have been oral promises. In the case of *Pillans et al. v. Van Mierop et al.*,¹¹⁵ Lord Mansfield asked "if any case could be found where the undertaking holden to be *nudum pactum* was in writing," and the court in that case upheld such a promise. Where oral or written charitable subscriptions have been enforced, not because one subscription was made in consideration for other subscriptions, or because subscriptions were given in consideration for a promise on the part of a committee or some one else, but because expenses have been incurred on the strength of the promises, or because other promises have been induced by it, we really have cases where the promises have been enforced

¹¹⁴ 11 Adol. & El. 438.

¹¹⁵ 3 Burr. 1663.

because they were intended to be binding and not because they were based on consideration.¹¹⁶ Other illustrations of cases where promises are enforced simply because they were intended to be binding though without consideration are found in gratuitous declarations of trust,¹¹⁷ in specific enforcement of gifts of land where possession has been taken and improvements made or part of the purchase price paid,¹¹⁸ and other cases of gifts,¹¹⁹ in cases of waivers,¹²⁰ in cases of stipulations of parties and their counsel, in the case of the enforcement of promises at the suit of third-party beneficiaries;¹²¹ and, of course, where the seal has not been abolished, promises under seal are enforced though without consideration, although the judges sometimes try to bring the specialty contract within the doctrine of consideration by declaring that the seal raises a presumption of consideration.¹²² Recent cases show a still greater tendency to abrogate the requirement of consideration and to return to the position of Lord Mansfield.^{122a}

¹¹⁶ *Y. M. C. A. v. Estill et al.*, 140 Ga. 291.

¹¹⁷ *Perry, Trusts*, 96; 39 Cyc. 57.

¹¹⁸ *Ames' Cases on Equity*, 306-9.

¹¹⁹ *Thomas v. Thomas*, 2 Q. B. 851.

¹²⁰ *Williston, Contracts*, secs. 139, 203; *Harlburt v. Bradley et al.*, 94 Conn. 495.

¹²¹ *Williston, Contracts*, secs. 356, 357, 361, 368, 381.

¹²² *II Street, Found. Leg. Lia.*, 8-19.

^{122a} Dean Pound has an interesting summary of this branch of the law: "On the other hand the extent to which courts today are straining to get away from the bargain theory and enforce promises which are not bargains and cannot be stated as such is significant. Subscription contracts, gratuitous promises afterwards acted on, promises based on moral obligations, new promises where a debt has been barred by limitation or bankruptcy or the like, the torturing of gifts into contracts by equity so as to enforce *pacta donationis* specifically in spite of the rule that equity will not aid a volunteer, the enforcement of gratuitous declarations of trust, specific enforcement of options under seal without consideration, specific performance by way of reformation in case of security to a creditor or settlement on a wife or provision for a child, voluntary relinquishment of a defense by a surety and other cases of 'waiver,' release by mere acknowledgment in some states, enforcement of gifts by way of reformation against the heir of a donor, 'mandates' where there is no *res*, and stipulations of parties and their counsel as to the conduct of and proceedings in litigation—all these make up a formidable catalogue of exceptional or anomalous cases with which the advocate of the bargain theory must struggle. When one

In the case of *McCrillis v. Sutton et al.*,¹²³ where a husband and wife supposed they had legally adopted a young man when he was a child but they had not, the court granted specific performance of a written promise of the former that the latter "should have on the death of the husband (and of the wife) the same right to their property as if he had been adopted." The only consideration, if any, in this case was love and affection and past consideration. There was no present benefit to the promisor, no detriment to the promisee (either in the sense of legal detriment or in the sense of any act or promise), no moral obligation which was once a legal obligation. There was not even an agreement, and probably no moral obligation. There was simply a promise in writing. Hence the case is authority that neither consideration nor agreement is necessary but that a mere promise intended to be binding is enforceable, at least if in writing.¹²⁴

Is it now Anglo-American law that a promise is enforceable without consideration? Once more, the answer must be: nobody knows.

CONCLUSION.

What is consideration in the Anglo-American law of contracts? No one knows. In the first place, in view of the many decisions which have enforced and are enforcing promises without consideration, no one can be sure that any form of consideration is required by our law. In the second place, even if some

adds the enforcement of promises at suit of third party beneficiaries, which is making headway the world over, and enforcement of promises where the consideration moves from a third person, which has strong advocates in America and is likely to be used to meet the exigencies of doing business through letters of credit, one can but see that Lord Mansfield's proposition that no promise made as a business transaction can be *nudum pactum* is nearer realization than we had supposed." An Introduction to the Philosophy of Law, 272-3.

¹²³ 207 Mich. 58.

¹²⁴ Other cases in accord are *Sutch's Estate*, 201 Pa. 305; *Brickell v. Hendricks*, 121 Miss. 356; *Thomason et al. v. Bischer et al.*, 176 N. C. 622. There is a tendency on the part of law as well as equity to enforce deliberate promises simply as promises under one pretext or another.

India and at least ten of our states no longer require consideration for the discharge of a contract. Wald's *Pollock, Contracts* (3d ed.) 211; Ames, *Lectures on Legal History*, 329-340. Many of our states also no longer require consideration for the transfer of property. In some states a promise in writing is given the same effect as a promise under seal. Comp. Laws N. D. 1913, secs. 5828, 5833, 5489, 5881.

form of consideration is required, no one can say what it is. Is it precedent debt? Is it moral obligation? Is it the Roman law *causa* as developed by equity? Is it *quid pro quo*? Is it benefit to the promisor? Is it detriment to the promisee? Apparently it may be any one of these. But no one would dare say that any one of these would under all circumstances be a sufficient consideration for a promise. One would be safest in tying up to the theory of detriment to the promisee. A contract drawn on this theory would probably be a well-drawn contract. Yet it would be error to say that a contract must have this consideration. There are too many cases decided on the theory of moral obligation and on the theory that every deliberate promise is binding for such a statement to be made. Furthermore, no one knows what detriment to the promisee means. It means one thing in one jurisdiction at one time and another thing in another jurisdiction at the same time, or in the same jurisdiction at another time. In explaining its meaning the courts have resorted to overfine explanations and hair-splitting distinctions, and reached unreasonable and irreconcilable conclusions. Insignificant and absurd things have been held to be sufficient until "detriment to the promisee" and the whole law of consideration have become little more than a form and technicality. Has not the tort idea of detriment to the promisee become as great a load for assumpsit as *quid pro quo* was for debt, or the seal for covenant? If the law of covenants should become entirely obsolete, and promises as such should not become enforceable, would not our modern consensual contract be placed by the action of assumpsit into as bad a straight-jacket as that into which the ancient contract was placed by the actions of covenant and debt?¹²⁵

¹²⁵ "It is significant that although we have been theorizing about consideration for four centuries, our texts have not agreed upon a formula of consideration, much less our courts upon any consistent scheme of what is consideration and what is not. It means one thing—we are not exactly agreed what—in the law of simple contracts, another in the law of negotiable instruments, another in conveyancing under the Statute of Uses and still another thing—no one knows exactly what—in many cases in equity." Pound, *An Introduction to the Philosophy of Law*, 276-7.

What should be done about this situation? It will be agreed that something should be done. The present situation is intolerable. Probably the courts, which got us into this situation, should get us out of it; but, if they should take as long in getting us out of it as they have taken in getting us into it, we could never wait for the action of the courts alone. Uniform legislation might be a more expeditious and practical solution. But probably the most hopeful instrumentality for remedying the present situation is the American Law Institute, which has already begun the restatement of the law of contracts. Irrespective of who is going to perform the task, what should be done toward performing it? What has never been stated cannot be restated. Yet, in general, what substantive law needs is not change so much as formulation. What, then, is going to be the Anglo-American law of consideration? Shall we say that it must be the resultant of all past historical development and twentieth century social needs?

By this test, what theory of consideration is demanded for Anglo-American law?

In answering this question there will have to be chosen either the theory that no consideration is required, or some one theory of consideration, or consideration but no particular theory.

The last alternative is our present situation, and it is to be hoped that the American Law Institute will do nothing to perpetuate it. Nothing could be worse than a situation where any one of half a dozen different things may be consideration, but nobody knows just when nor how. To say that consideration, in a unilateral contract, is "a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor"; and in a bilateral contract is "mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisee or beneficial to the promisor"¹²⁶ would be unsatisfactory (1) because it would not be clear whether it excluded or included cases of

¹²⁶ Williston, *Contracts*, secs. 102, 103f.

moral consideration and any act or promise under existent law, (2) because, if it did exclude these, it would be contrary to modern social interests, and (3) because such a definition of detriment and benefit is too indefinite. It does not restate the present law. It probably would be no improvement of the present law. It would simply leave it in its present state of chaos.

The second alternative would require choosing between the different known theories of consideration. *Quid pro quo* has already proven itself inadequate to meet the needs of society because not adapted for the enforcement of promises as such, and no attempt should be made to extend or revive it. Precedent debt as consideration was a mere fiction, offers no real possibilities, and is probably contrary to social interest. Benefit to the promisor adds nothing to, and has no advantages over, detriment to the promisee except in the case of a promise by a third person to one already under a pre-existing legal duty. Other cases of benefits conferred are sufficiently covered by quasi contracts, and this case could be better cared for by one of the theories of detriment. The Roman *causa* offers no possibilities, because "there is no definable doctrine of *causa*."¹²⁷ "The Romans had no theory of *causa*, nor did they consider it an essential condition for the validity of contracts, but they have often applied the principles of *causa*."¹²⁸ The Roman law and probably the modern civil law are authority for no consideration more than for a particular theory of *causa*.¹²⁹ Moral obligation, in the same way, is so close to no requirement of consideration, or so likely to evolve into it, that it needs no separate discussion.

This leaves for consideration three alternatives, either one of the theories of detriment to the promisee or no requirement of consideration at all. The theory of detriment to the promisee in the sense of legal right, legal privilege, legal power, or legal immunity is the theory generally chosen. The theory of detriment

¹²⁷ Lorentzen, Cause and Consideration, 28 YALE L. JOUR. 646; Buckland, A Textbook of Roman Law, 425.

¹²⁸ Bry, Principes de droit romain (5th ed.), 502.

¹²⁹ Lorentzen, Causa and Considération, 28 YALE L. JOUR. 633.

to the promisee in the sense of any act or promise is the one chosen by the late Dean Ames. The theory of no consideration at all is chosen by Dean Pound.

The theory of detriment to the promisee in the sense of any legal right, legal privilege, legal power, or legal immunity is a tort notion whipped into place and made to do duty as consideration in contracts, and then covered with all the technicality known to the common law. It is unlike every other kind of consideration known to man. Its existence is accidental, and due wholly to the fact that assumpsit was a more popular action than the other contract actions because tried before a jury, and gradually supplanted them. Had debt been adapted to the enforcement of promises and tried by a jury, our consideration to-day might be *quid pro quo*. Had equity retained its jurisdiction over contracts, our consideration might be some sort of *causa*. Had covenant been able to withstand assumpsit, we should probably have no requirement of consideration at all. No one knows exactly what this requirement means, because, though theoretically confined to cases of legal capacity, practically it has been stretched to cover cases not within its definition and to exclude cases within it. It is not in harmony with the social interests of the day. This is proven by the cases of moral consideration, by the cases of detriment in the sense of any act or promise and by the cases which have abandoned the theory of consideration. The decisions in all of these cases have been required by what is regarded as the modern sense of justice, but they could not have been obtained if they had been decided according to the theory of detriment now under consideration. This theory is as liable to accomplish injustice as justice, and this alone is enough to condemn it. It would, therefore, be useless to choose this theory. We would never stick to it if we chose it.

The theory that no consideration should be required but that all promises should be enforced "which a reasonable man in the position of the promisee would believe to have been made deliberately to assume a binding relation" is advocated by Dean Pound perhaps more strongly than by anyone else. He contends that a "man's word in the course of business should be as good

as his bond and that his fellow men must be able to rely on the one equally with the other if our economic order is to function efficiently."¹³⁰ There is no proof that any kind of consideration is intrinsically necessary for contracts. One common law contract, the covenant, had no such requirement and it was never objectionable for this reason. There are other modern illustrations. The Roman and modern civil law perhaps corroborate this conclusion. Countries, like Brazil, Germany, Japan and Switzerland, which recently have adopted civil codes after a thorough study of the subject, have decided to make no requirement of consideration.¹³¹ Hebrew law made no requirement of consideration for contracts.¹³² Why should any kind of consideration be required? Our common law has said: in order that gratuitous promises may not be enforced. Lord Mansfield held the opinion that it was for the sake of evidence,¹³³ and the writer is inclined to agree that the latter reason is fully as important as the former. The most important thing is to make sure that men shall not be held on promises which they did not make. Writing might be better evidence than consideration. A very strong case can be made for this position. Philosophically it seems sufficient, at least in the case of writing. It is supported by sufficient authority, because it is supported both by the old cases of contracts under seal and by many cases of modern origin.

The theory of detriment to the promisee in the sense of any act or promise, though like the other theory of detriment in origin, would mean no further consideration than would be required by our modern law of agreement, with its requirement of offer and acceptance, either by act or by promise. There is no unilateral agreement until the act or forbearance called for by

¹³⁰ Pound, *An Introduction to the Philosophy of Law*, 276, 282.

¹³¹ Lorentzen, *Causa and Consideration*, 28 *YALE L. JOUR.* 642.

¹³² 41 *AM. LAW REV.* 717-8.

¹³³ "I take it that the ancient notion about the want of consideration was for the sake of evidence only, for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded on the same principle. In commercial cases among merchants the want of consideration is not an objection." *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1653.

a promise has been rendered, both with a knowledge of the offer and with an intent to accept it.¹³⁴ Here is detriment to the promisee in the sense of an act. There is no bilateral agreement until the offeree has accepted the proposal of the offeror by making the counter promise called for by the offer. Here is detriment to the promisee in the sense of a promise. In other words consideration of detriment to the promisee in the sense of any act or promise is synonymous with agreement, and it would be superfluous to talk about consideration, for whenever there was a valid agreement there would be sufficient consideration. This sort of consideration answers the requirements of both evidence and bargain. It is all in the way of consideration that the modern social interest requires. It is required by the modern social interest. It includes all the cases decided to have consideration under the legal detriment theory, because the term "any act or promise" is broader and would include any act or promise which is a legal right, a legal privilege, a legal power, or a legal immunity. Hence the adoption of this theory would involve no changes in such decisions. It includes cases, like voidable promises and promises by one under a pre-existing duty, which under the legal detriment theory are not sufficient consideration, though many courts enforce the contracts on unsatisfactory grounds; but it does not include many cases of moral obligation, that should be enforced, although, if there is a social interest which favors the enforcement of obligations barred by the statute of limitations, or by a discharge in bankruptcy, or by the statute of frauds, it might be simpler to change these statutes than to change the law of consideration.¹³⁵ It does not go as far as the theory which would enforce every promise intended to be binding. Does the social interest require this? Such theory would, of course,

¹³⁴ *Taft v. Hyat*, 105 Kan. 35; *Fitch v. Snedaker*, 38 N. Y. 248; *Williams v. West Chicago, etc. Co.*, 191 Ill. 610. *Williams v. Carwardine*, 4 Barn. & Adol. 621, *contra*.

¹³⁵ The writer agrees with Dean Pound that men should have a right to rely upon statements of others—perhaps under all circumstances—but unless these statements are in writing or in the form of an agreement he would leave their enforcement to non-legal means.

abrogate both the law of agreement and the law of consideration. The law of agreement has proven too satisfactory to be thus easily given up. Neither are we sure that the door ought to be opened to what we now call past consideration, except so far as moral obligation and quasi contracts are concerned. We may not be quite ready wholly to give up the notion that something must be given for a promise. The theory which would enforce every promise "made deliberately to assume a binding relation" goes too far if it includes oral promises, because it to that extent would violate not only the requirement of bargain but also the requirement of evidence; and it does not go far enough if it excludes oral promises, because the social interest requires the enforcement of other promises than those in writing. The law of agreement is free from all these objections.

The writer is inclined to reject each of the foregoing solutions as a complete solution in itself, and to adopt a combined or dual solution of no consideration where a promise is in writing and no other consideration than is found in the law of agreement in all other cases. He believes that the law of agreement would not give legal validity to all promises which ought to be enforced. If an act or forbearance, or the promise thereof, has been given by one person for a like promise by another, either promise should be enforceable, but if neither has been given it does not follow that no promise should be enforceable. The contracts under seal, the cases of moral consideration and the cases where other promises have been enforced without consideration, show that there is a social interest which requires some simpler contract law even than that of agreement. He believes, on the other hand, that to enforce all promises "deliberately made to assume a binding relation" might open the door to the enforcement of promises which ought not to be enforced, because either never made or not made voluntarily. The statute of frauds and the law of equity show a social interest against the enforcement of mere oral promises. But to enforce any promise in writing or in the form of agreement would make the law of contracts in every way conform to social interest. This solution should be

adopted as the Anglo-American law of consideration because it is the most rational, because it would provide a means of harmonizing the conflicting decisions, and because it would give an opportunity for all the courts to do what the more progressive are now doing. It would be practical in operation, and acceptable alike to the business and non-business world. It would make possible a definition. It would save contracting parties and litigants from the necessity of running the gauntlet of consideration. All of good that there is in the law of consideration is found in the law of agreement, and it is so good that we cannot afford to throw it away to enforce every promise intended to be binding. All of the contract good which the law of agreement does not possess is found by the enforcement of written promises and this is too good to be abandoned for the law of agreement.

No theory of consideration, nor consideration itself, was divinely ordered. Historically the Anglo-American forms of consideration are purely accidental. Their abolition would not wreck the legal world. Anglo-American law at the present time has no definite requirement of consideration, but it has authority for any one of a number of different kinds of consideration. The situation should be changed, and we are practically free to do whatever we want to do. It would seem, therefore, that the proper thing is to do whatever is required by social interest, whether it be no consideration, or no other consideration that is found in the law of agreement, or an alternative requirement of writing or agreement; and to discard all other theories and requirements of consideration.

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